SOO YAU CHO

v.

CAPITALCORP SECURITIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R3-12-590-1998]
21 SEPTEMBER 1999

CIVIL PROCEDURE: *Judgment - Default of appearance - Setting aside - Whether default judgment was irregular - Whether O. 7 r. 3(1) and O. 14 r. 5(1) of Subordinate Court Rules 1980 complied with*

CONSTITUTIONAL LAW: *Courts - Forum for trial - Transfer of proceedings - Territorial jurisdiction of subordinate court - Subordinate Courts Act 1948, s. 59 and Practice Note No 4 of 1993 - Whether suit commenced at proper forum - Factors to consider - Whether application for transfer to be granted*

The appellant opened a trading account with the respondent, a share broking company, to trade shares for the respondent. The respondent suffered losses and claimed that the appellant failed to indemnify them accordingly. The appellant was then summoned to court regarding this dispute but he failed to show up and this resulted in a judgment in default being entered against the appellant.

The appellant applied to set aside the judgment in default and also applied to have the proceedings transferred to the Labuan Sessions Court from the current Kuala Lumpur Sessions Court.

Held:

[1] As the appellant had received the summons and the statement of claim on 1 March 1997 and the second mention date was fixed on 28 March 1997, O. 7 r. 3(1) of the Subordinate Court Rules 1980 ('SCR') had been complied with. The judgment in default entered by respondent was in accordance with O. 14 r. 5(1) of the SCR. The appellant showed no interest in his case. As of 28 March 1997, it was evidenced that he did not engage solicitors and file a notice of appearance or statement of defence 1997. Thereafter, it was only on 4 April 1997 did he instruct to conduct a file search, and he did not contact the respondent's solicitors at all. (p 398 c-h)

[2] Local jurisdiction referred to under s. 59 of the Subordinate Courts Act 1948 refers to the territorial jurisdiction in the Federal Territory and the

States of Malaya. The territorial jurisdiction of the Sessions Court was defined under Practice Note No 4 of 1993 which showed that the respondent's suit was properly commenced in the Kuala Lumpur Sessions Court. (p 402 f)

[3] The appellant's application to have the dispute transferred to Labuan was denied. The cause of action arose in Kuala Lumpur where the share transactions executed. The respondent's company, where the appellant had opened an account with, was situated in Kuala Lumpur. Furthermore, the respondent's witnesses, ie, their officers and the appellant's remisier were in Kuala Lumpur as well. The respondent would incur higher costs in having these witnesses and the respondent's solicitors attend a trial in the Labuan Sessions Court as opposed to the appellant's cost of having to appear before the Kuala Lumpur Sessions Court. (p. 402 a-b)

[Appellant's appeal dismissed with costs.]

Case(s) referred to:

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 ***(refd)***

Inter-Pacific Securities Sdn Bhd v. Fong Ping Yuen (Guaman No. D1-22-558-1998) (unreported) ***(refd)***

Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 ***(refd)***

Ong & Co Pte Ltd v. Foo Sae Heng [1990] 1 CLJ 856; [1990] 3 CLJ (Rep) 820 ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(refd)***

Legislation referred to:

Subordinate Courts Act 1948, s. 59, sch. 3, item 4

Subordinate Courts Rules 1980, O. 5 r. 6, O. 7 rr. 3(1), 19, O. 14 r. 5(1)

For the appellant - Kingston TK Tan (HQ Kwang); M/s Heiley Hassan, Tan & Partners

For the respondent - Mohd Zaini Hj Mazla; M/s Gideon Tan Razali Zaini

Reported by M Maheswaran

JUDGMENT

Faiza Tamby Chik J:

The respondent is a registered stock broking company registered in Malaysia and a member of the Kuala Lumpur Stock Exchange. The appellant had opened an account with the respondent with the purpose to trade shares. The respondent upon the instructions of the appellant, buys and sells shares for the respondent *vide* the account of the appellant. The appellant subsequently

failed to indemnify respondent for losses suffered by the respondent. The respondent through its solicitors, sent a letter of demand dated 12 June 1996 to the appellant and thereafter, the respondent filed a summons and statement of claim in the Kuala Lumpur Sessions Court. The summons and statement of claim was served on the appellant through a letter dated 25 February by AR registered post by the respondent's solicitors and an affidavit of service in respect of the service and receipt of the summons was filed on 24 March 1997.

On the first mention date, 28 February 1997, the respondent's solicitors had not filed the affidavit of service and therefore another mention date was given – ie, 28 March 1997. The respondent's solicitors through a letter dated 19 March 1997 informed the appellant the new mention date and had informed the appellant that he had to attend court on the mention date to answer to the respondent's claim failing which the respondent will pray for judgment in default to be entered against him. On 28 March 1997, the appellant failed to attend court. Further to that, judgment in default was entered against the appellant. On 2 June 1997 the appellant filed a notice of application to set aside the judgment in default entered against him and also applied to transfer the proceeding of the case to the Labuan Sessions Court. The appellant's notice of application was supported by four affidavits which are as follows:

(i) Affidavit in support affirmed by Soo Yau Cho on 28 May 1997;

(ii) defendant's affidavit in reply affirmed by Soo Yau Cho on 23 September 1997;

(iii) defendant's second affidavit in reply affirmed by Soo Yau Cho on 13 January 198; and

(iv) defendant's third affidavit in reply affirmed by Soo Yau Cho on 6 May 1998.

The respondent contested the application of the appellant and filed five affidavits which are as follows:

(i) Affidavit in reply affirmed by Mohd Yusof bin Pandak Yatim on 5 August 1997;

(ii) further affidavit affirmed by Lim Kim Leng on 26 November 1997;

(iii) plaintiff's further affidavit affirmed by Mohd Yusof bin Pandak Yatim on 26 November 1997;

(iv) plaintiff's second further affidavit affirmed by Abdul Rahim bin Abdullah on 5 March 1998; and

(v) plaintiff's third further affidavit affirmed by Abdul Rahim bin Abdullah on 5 March 1998.

The respondent raised a preliminary objection that the appellant's record of appeal dated 23 December 1997 was not prepared in accordance with the rules of court. The respondent submitted that the judgment in default was not irregular. Order 7 r. 3(1) Subordinate Courts Rules 1980 provides:

> Unless the court otherwise orders, a summons must be served on the Defendant not less than 14 days before the return day of the summons.

It is observed that the appellant had received the summons and statement of claim on l March 1997 and the second mention date was fixed on 28 March 1997. Therefore, O. 7 r. 3(1) of the Subordinate Courts Rules 1980 had been complied with. The judgment in default entered was in accordance with O. 14 r. 5(1) of the Subordinate Courts Rules 1980, which provides:

> 5(1) A defendant who disputes his liability for the whole or part of any claim in the action may,
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> (a) at any time before the return day, serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used; or
>
> (b) appear on the return day and dispute the plaintiff's claim.

The appellant received the summons and statement of claim on 1 March 1997 and judgment in default was entered on 28 March 1997. The appellant had four weeks to engage solicitors and to file notice of appearance.

In the event the appellant had no knowledge of the second mention date, he ought to engage solicitors immediately after he received the summons and statement of claim on 1 March 1997 and thereafter instructed his solicitor to file a notice of appearance or statement of defence, and take the initiative to ascertain what had happened on 28 March 1997 and immediately conducted a file search or try to contact the respondent's solicitors.

It is observed that the appellant did not engage solicitors and file a notice of appearance or statement of defence until 28 March 1997; and only instructed his solicitors to conduct a file search on 4 April 1997 and did not contact the respondent's solicitors at all.

Therefore it can be concluded that the appellant's procrastination shows that the appellant was not concerned about his case and his statements were an afterthought. Moreover the letter informing the appellant of the new mention date had been sent to the appellant on 19 March 1997. There were nine days period from 19 March 1997 to 28 March 1997, and it is hard to believe that the appellant did not receive the letter. I am of the view that the default judgment was entered accordingly.

On perusing para. 9 affidavit in reply affirmed by Mohd Yusof Pandak Yatim on 5 August 1997 (p. 28 of record of appeal), para. 6 of further affidavit affirmed by Lim Kim Leng on 26 November 1997 (p. 44 of record of appeal) and para. 3 of the plaintiff's third further affidavit affirmed by Lim Kim Leng on 5 March 1998 (p. 62 of record of appeal), it is noted that the appellant had given a "standing order" to buy and sell certain shares, if the prices of the said shares were within certain range. This statement was not only made by two of the respondent's officers, Mohd Yusof bin Pandak Yatim and Abdul Rahim bin Abdullah, but by the appellant's own remisier, Lim Kim Leng. The appellant's remisier himself affirmed the affidavit and said that the appellant told him that although he will be out of the country, the appellant still wanted to buy and sell certain shares and had given a "standing order" to the remisier. The appellant's remisier had in para. 8 of affidavit affirmed by him on 26 November 1997 (p. 45 of appeal record) stated that everything done by him was upon the appellant's instruction. Through the affidavits filed herein, especially the affidavits affirmed by Lim Kim Leng (appellant's remisier), there was strong evidence and proof that the transactions in the appellant's said account were done by virtue of the appellant's own instructions.

With reference to para. 7 of the further affidavit affirmed by Lim Kim Leng on 26 November 1997 (p. 44 of record of appeal) and para. 3 of the plaintiff's third further affidavit affirmed by 5 March 1998 (p. 62 of record of appeal) it can be implied that the appellant had never contacted the remisier to report about the false usage of the appellant's account, and the remisier had never promised the appellant to settle any losses incurred by the appellant. In reply to para. 11 of the affidavit in reply affirmed by Mohd Yusof bin Pandak Yatim on 5 August 1997 (p. 48 of record of appeal), and para. 4 of further affidavit by Mohd Yusof bin Pandak Yatim affirmed on 26 November 1997 (p. 48 record of appeal) and para. 4 v(a) of the second plaintiff's further affidavit by Abdul Rahim bin Abdullah affirmed on 5 March 1998 (p. 58 of record of appeal) the respondent submitted that all contract notes, contra notes, monthly statements and 'set off statements' had been delivered to the appellant at all material times to the address given by the appellant in the account application form signed by the appellant and exhibited as 'ARA1' (pp. 99-101 record of appeal), and the appellant had never complained to the respondent about the

transactions done even after he had received all the contract notes, contra notes and monthly statements sent to her because if there was any complaint the appellant should make the complaint to the respondent within 24 hours as stated in the "contract notes" exhibited as "MYP1" (pp. 84-96 of record of appeal), and also if the appellant intended to deny the transactions made, the appellant needed to do so as soon as she received the contract notes and the contra notes and not after judgment in default was entered. It is observed herein that the appellant in the instant case did not deny the receipt of the contract notes and contra notes sent to her. The appellant is now estopped from disputing the transactions made in her account because there is no evidence, documentary or otherwise of such denial.

In the case of *Ong & Co Pte Ltd v. Foo Sae Heng* [1990] 2 MLJ 85 the court held that:

> (2) As regards to the point that the defendant had never given instructions to purchase the shares, this point was totally devoid of merit. Debit notes were sent to the Defendant. The Defendant had not denied that he received the debit notes. If in fact the purchases were contrary to instructions, one would expect an immediate protest by him; and
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> (3) By not objecting to the documents sent to him, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.

In *Inter-Pacific Securities Sdn Bhd v. Fong Ping Yuen* (Guaman No. D1-22-558-1998) in the High Court (Bahagian Dagang) Kuala Lumpur, at pp. 13, 14 and 16 where Yang Arif Dato' Haji Mohd Ghazali bin Mohd Yusoff on 5 January 1999 stated as follows:

> ... copies of the contract were sent to him at his mailing address and it was announced therein that any errors must be notified within 24 hours of receipt.
>
> There is nothing to show or suggest that the defendant made any protest or raised any objections about the transactions until he received a letter of demand for the outstanding contra losses from solicitors for the Plaintiff in March 1998 and consequently instructed his solicitors to dispute the claim. There is also nothing to show that the Defendant queried or lodged any protest against the Plaintiff in January 1998 upon receipt of the contract notes which were issued by the Plaintiff as a result of the selling out of the shares conducted on 12th January 1998 ... .
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> ... Surely, if at all it is true as claimed by the defendant that he did not place any order to purchase the said Zaitun shares, one would expect him to immediately jump and scream at Michelle Lim for executing such purchase without his instructions or scream blue murder at the plaintiff for issuing those contract notes showing that such purchase had taken place on his account when

> he never placed such orders. There is nothing to show or even suggest that the defendant had reacted that way. He did not even protest when the plaintiff issues the said contra statement to him ... if at all he never gave such instructions to buy, I would expect him to immediately lodge a complaint or report with the relevant bodies in the industry, eg, the KLSE or the Securities Commission or even the police, it being a serious matter. There is nothing to show or even suggest that the defendant had pursued the matter on those lines. Under the circumstances, I cannot see how this stand taken by the defendant can be said to be triable issue ... .

It is observed that the trading limit is for the internal usage of the respondent which can be increased or decreased entirely at the respondent's discretion. It is noted that a trading limit is not a debt limit, that is even when the trading limit has passed.

With reference to para. 5 of the further affidavit affirmed by Mohd Yusof bin Pandak Yatim on 26 November 1997 (pp. 48 and 49 of record of appeal) and para. 5 of the plaintiff's second further affidavit affirmed by Abdul Rahman bin Abdullah on 5 March 1998 (pp. 59 and 60 of record of appeal) it is noted that the MBB cheque No. 113570 derived from the selling off of the shares, that was the appellant's shares given to the remisier by the appellant herself so that the shares were sold and the sum obtained be used to pay off the shares purchased by the remisier on the appellant's instruction. The shares paid off by using the sum obtained from the selling off of the said shares were stated in the "official receipt" No. 105994 dated 18 May 1995 exhibited as "MPY2" in the plaintiff's further affidavit affirmed on 26 November 1997 (pp. 97-98 of record of appeal). The said official receipt shows the full payment of the transaction No. TN 235483, TN 235575 and TN 255022 also shown in the monthly statement for March 1995 marked as exh. "SYC2" (pp. 75-78 of Record of Appeal), and part payment of the Repco shares SF045625 is stated in the monthly statement of April 1995 marked as exh. "ARA2" (pp. 102-104 of Record of Appeal).

Therefore, I am of the view that it is not right for the appellant to aver that he had no knowledge of the said money.

As to the police report dated 7 May 1997 reference is made to para. 14 of the affidavit in reply affirmed by Mohd Yusof bin Pandak Yatim on 5 August 1997 (p. 30 of record of appeal) which showed that the said report was only made after the judgment in default had been entered. The appellant's remisier also had made a police report on 5 August 1997, where the said report had been enclosed as exh. "LKL1" to the further affidavit affirmed by Lim Kim Leng on 26 November 1997 (pp. 82-83 record of appeal).

In the instant case, the cause of action clearly arose in Kuala Lumpur where all the transactions for the buying and selling of shares were done in Kuala Lumpur. The appellant himself had chosen to open an account with the respondent, a share broking company situated at Kuala Lumpur, to deal with the transactions of buying and selling of shares. It is therefore illogical if this proceeding was to be transferred from Kuala Lumpur to Labuan since the respondent's witnesses, especially the appellant's remisier and the respondent's officers are in Kuala Lumpur, and again the cost of witnesses and the respondent's solicitors to attend Labuan Sessions Court would far be higher compared to the appellant's cost to attend court in Kuala Lumpur.

The relevant provision in respect of the territorial jurisdiction of the subordinate court is s. 59 Part VI of the Subordinate Courts Act 1948. Section 59 states:

> Constitution and territorial jurisdiction of Sessions Court
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> (1) ...
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> (2) Subject to this Act or any other written law, a Sessions Court shall have jurisdiction to hear and determine any civil and criminal cause or matter arising within the local limits of jurisdiction assigned to it under this section or, if no such local limits have been assigned, arising in any part of the local jurisdiction of the respective High Court.
>
> (3) ...
>
> (4) ...

The local jurisdiction referred to under s. 59 refers to the territorial jurisdiction in the Federal Territory and the States of Malaya. The territorial jurisdiction of the Sessions Court was defined under Practice Note No. 4 of 1993 which shows that the respondent's suit was properly commenced in the Kuala Lumpur Sessions Court.

I am of the view that it is clearly incorrect in law for the appellant's counsel to submit that the defendant's residence is out of jurisdiction, for jurisdiction here refers to countries outside Malaysia. Order 5 r. 6 of the Subordinate Courts Rules 1980 relates mainly to the procedure for the issuing and sealing of the summons at the court registry. Any party may begin proceedings in the subordinate courts provided the court has the jurisdiction to hear the matter and where so required, leave of court has been obtained for the issue of summons. The Sessions and Magistrates' Courts are empowered to allow service of its process outside Malaysia in Singapore or Brunei, or, with the leave of the High Court, elsewhere.

Order 7 r. 19 of the Subordinate Courts Rules 1980 provides that service of a summons out of the jurisdiction is permissible with the leave of the court. And item 4 of the third schedule to the Subordinate Courts Act 1948 (Act 55) on additional powers of sessions courts provides that the court has power to allow service of its process outside Malaysia in Singapore or Brunei, or with the leave of the High Court, elsewhere.

In *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268, 271 the court said:

> When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the inconvenience caused may outweigh the amount of costs awarded to him.

It is clear that Lim Beng Choon J made the above decision based on the reason that the cause of action in that case was the same as the defendant's place of living.

In *Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365, Abdul Malik JC (as he then was) said at p. 366:

> The legislature in creating a branch of the High Court in Malaya in each State, must have thought of bringing the High Court closer to the rakyat. Easy accessibility of the High Court would lessen the inconvenience of travelling (the amount of costs would not outweigh the inconvenience caused) and the incurring expense that would flow from it. This would, in turn, facilitate the disposal of cases and ease the backlog to a certain extent. This argument would likewise apply, with equal force, to the Sessions Court.

In *Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd* [1990] 1 CLJ 262; ([1990] 2 CLJ (Rep) 11), Abu Mansor J (as he then was) said at p. 264 (p. 13):

> Considered from the point of view of convenience, I also held that Kuching would be more convenient with the defendant residing there and the witnesses being there.

I am of the view that this matter should be heard in Kuala Lumpur Sessions Court for the following reasons:

(i) the cause of action arises in Kuala Lumpur;

(ii) the documents pertaining to this matter are all kept at the respondent's office in Kuala Lumpur;

(iii) the majority of the witnesses would be that of the respondent's employees or former employees who would all reside in Kuala Lumpur; and

(iv) the costs involved for the witnesses and the documents to be transferred to Labuan would be inherently more compared to this matter being heard in Kuala Lumpur.

I am also of the view that the judgment in default dated 28 March 1997 had been entered accordingly. In the premises, the appeal is hereby dismissed with costs.